THE HON'BLE MR JUSTICE A.GOPAL REDDY

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W. P. No. 20437/1994

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Dt.21-2-2006

M/s. Rama Krishna Binny Rice Mill, represented by its Partner Mr. V.Yadaiah, Lingojiguda, Saroornagar, Ranga Reddy District.

..Petitioner

V.

1. A.P.State Electricity Board, represented its Secretary, Vidyut Soudha, Somajiguda, Hyderabad

and others. ..Respondents

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ORAL ORDER:

The petitioner is a Rice Mill and is availing low tension supply of electricity from the respondent-Board for a contracted load of 74 HP under LT category-III vide service connection No.271 since 1985. The fourth respondent- Assistant Divisional Engineer, Saroornagar inspected the premises of the petitioner on 28-3-1989 and verified the meter. Accordingly, a provisional notice dt. 10-4-1989 was issued stating that meter box seal for CTs compartment and meter terminal cover seals are found to be counterfeit. A study of the past record discloses that the consumption being recorded by the meter is unduly low taking into account the connected load, the number of hours of use of electricity, the purpose for which the petitioner is availing power and related factors. He, prima facie, found that consumer is guilty of pilferage and accordingly, estimated the value of energy pilfered by the petitioner, provisionally, at Rs.3,00,640-50 and called upon the petitioner that if he is desirous of obtaining restoration of power supply, pending enquiry, has to pay 50% of the estimated value of energy pilfered + reconnection charges. Questioning the same, the petitioner filed W.P.No.5442/89 before this court. Initially, this court directed restoration of power supply on deposit of Rs.25,000/-. Finally, this court disposed of the said writ petition with a direction to the respondents therein that they shall not demand any further amount under the impugned provisional assessment notice till the final assessment proceedings are completed after giving adequate opportunity to the petitioner, granting liberty to him to raise all possible objections before the respondents at the final assessment proceedings, including those raised in the writ petition. On disposal of the writ petition, the third respondent-Superintendent Engineer issued a show cause notice raising a demand for payment of Rs.4,54,349-25 towards compensation for pilferage of energy + Rs.150/- towards supervision charges. On written representation being filed by the petitioner, the third respondent finally estimated the value of the loss of energy sustained by the Board at Rs.12160-80 and accordingly directed the petitioner-consumer to contact the Assistant Accounts Officer and pay the said amount, less the amount already paid, intimating that further appeal lies against the said order to the Chief Engineer. The petitioner has not filed any appeal questioning the said final assessment order. While so, the second respondent-Member of A.P. State Electricity Board through his notice dt. 29-6-1992, in exercise of suo motu powers under condition 39.11 of the Revised Term and Conditions of Supply of Electricity intimated that the petitioner-consumer has pilfered energy and loss sustained by the Board by reason of malpractice is Rs.4,54,349/- + Rs.150 towards supervision charges and called upon him to file his objections, if any, to the provisional estimation so arrived within 30 days from the date of receipt of the notice, to which, the petitioner submitted his objections on 18-7-1992. On considering the explanation submitted by the petitioner, the

second respondent passed final orders dt. 4-12-1993 valuing the energy estimated pilfered at Rs.4,54,349/-. Questioning the legality and validity of the said order, the present writ petition has been filed contending that the second respondent who conducted proceedings afresh by totally ignoring the existing final assessment order of the Superintending Engineer (Assessment) is without jurisdiction and a show cause notice issued by the second respondent does not serve as a lawful foundation for exercising revisional jurisdiction because it does not mention why the conclusions of the Superintending Engineer are illegal or improper. Principles of natural justice have been violated by the procedure adopted by the second respondent as material objections raised by the petitioner have not been considered. The meter, which was removed from the premises of the petitioner, was tested in the presence of the petitioner's representative by the MRT Department, which gave report. It clearly discloses that no incriminating features either external or internal have been noticed and the errors are within the permissible limits. Therefore, there is no foundation for coming to the conclusion that the petitioner-consumer pilfered energy.

The fourth respondent filed a counter on 20-2-2006 at the midst of the arguments, stating that the Chairman under Cl.39.11 of Revised Term and Conditions of Supply of Electricity nominated the Member(D & RE) to examine the petitioner's case, who issued the revised show cause notice on 29-6-1992 provisionally assessing the loss sustained by the Board. After considering the written representation submitted by the petitioner, the second respondent found that the third respondent erred in considering the various factors for assessing the loss sustained due to pilferage of energy and set-aside the order passed by the third respondent and revised assessment order has been made through the impugned proceedings. When the petitioner was intimated and called upon to present at MRT test to be conducted, he never responded to the said letter and test report reveals that seals of the meter are found to be counterfeited and the petitioner has indulged in pilferage of energy. The impugned order passed by the second respondent is as per the Revised Term & Conditions of Supply of Electricity and the same was passed after considering the detailed written representation submitted by the petitioner and after giving due opportunity, which cannot be subjected to judicial review since the said pilferage of energy was assessed as per the accepted norms.

Sri Veera Swamy, learned counsel for the petitioner contends that as per Condition No.39.7.4.3 of the Revised Term and Conditions of Supply of Electricity assessment shall be limited to a maximum of one year prior to the date of inspection in case of ambiguity is only provisional assessment since condition No.39.7 deals with provisional assessment

only and Condition 39.9 deals with final assessment. Though under Condition No.39.11 Chairman or his nominee may at any time call for and examine the record of any order passed or proceeding recorded by final assessment authority or appellate authority, but he cannot re-open final assessment made by the third respondent. Since MRT test certificate dt. 5-6-1993 which discloses that the errors are within the permissible limits and the same is not adverse to the case of the petitioner, the third respondent-Superintending Engineer rightly assessed the value of the loss of energy sustained by the board on account of pilferage by the petitioner-consumer at Rs. 12,160-80 + Rs.150 towards supervision charges, which cannot be faulted with. He further contends that without finding fault with the final assessment made by the third respondent, the second respondent cannot re-assess the same.

Refuting the same, learned Standing Counsel for the Board contends that it is not the case of the petitioner that he has not pilfered the energy, having admitted that he accepted the final assessment and has not preferred any appeal against final assessment order, it is not open for him to contend that he has not pilfered energy. Once under condition No.39.11 the Chairman or his nominee at any time may suo motu call for and examine the record of any order passed or proceeding recorded by final assessment authority or appellate authority, which is beyond the scope of judicial review under Art. 226 when a fair opportunity was given to the petitioner before passing final assessment order and placed reliance on the judgment of the Supreme Court in J.M.D. ALLOYS LIMITED V. BIHAR SEB.

In J.M.D.ALLOYS LIMITED (1 supra) on which much reliance has been placed by the learned counsel for the respondent Board, the Supreme Court noted with approval of its earlier judgment in State of Uttar Pradesh v. Maharaja Dharmander Prasad Singh (AIR 1989 SC 997), wherein it was held that judicial review under Art. 226 cannot be converted into an appeal and judicial review is directed, not against the decision, but is confined to the examination of the decision making process and upheld the dismissal of the writ petition by the High Court.

The submissions of the learned counsel have to be considered in the light of the relevant conditions ie., 39.7.4.3, and 39.11, which read as under:

> 39.7.4.3:- The assessment shall be made for entire period during which pilferage is taking place and can be clearly established: If there is any ambiguity the period should be limited to a maximum of one year prior to the date of inspection. The consumption so assessed shall be charged at the special rates as prescribed in Cl.39.12.1

39.12.1: The value of the energy estimated as a result of pilferage of energy or malpractice shall be charged at the special rates prescribed by the Board and notified in the Tariff Notifications from time to time. These special rates include the rate at which the energy was already charged for in the case of all malpractices. In the case of pilferage of energy the special rate shall be levied after excluding the consumption, recorded by the meter from the assessed consumption (BP Ms.No.291 dt. 27-11-1990 & lBP Ms.No.431 (Opn.Coml) dt. 15-2-1994).

39.11: The Chairman or his nominee (the nominee being any member of the Board) may suo motu at any time call for and examine the record of any order passed or proceeding recorded by final assessment authority or appellate authority for the purpose of satisfying himself regarding the propriety or legality of such order or proceeding and may pass such order in reference, thereto, as he may think fit. No orders adverse to the consumer shall be passed without giving notice and opportunity for making a written representation to the consumer. The order passed by the Chairman or his nominee shall be final and not liable to be questioned in any court of law. The consumer shall have no right to invoke this provision.

It is fallacy to contend that once condition 39.7 deals with provisional assessments and while taking the final assessment the said formula which is adopted for arriving the value of the energy pilfered provisionally cannot be taken into consideration under condition 39.9 which deals with final assessment. How pilferage can be arrived provisionally is subject to final assessment after giving an opportunity to the petitioner. The provisional assessment was made as per the principles enumerated therein unilaterally without giving any opportunity to the consumer and the same was intimated to the consumer. After giving an opportunity final assessment will be made basing on the principles enshrined for arriving the energy pilfered and as no method is followed for arriving value of such pilferage, it is always open for the revisional authority to suo motu call for and examine the record and arrive whether final assessment made is in accordance with the conditions for assessing the energy which was pilfered. While exercising suo motu jurisdiction, the petitioner should be informed how the action proposed to be taken and how the final assessment can be made, which was not correctly arrived by the assessing authority. The final assessing authority in his show cause notice issued to the petitioner though raised a demand for payment of Rs.4,54,349.25 towards compensation for pilferage of energy has not stated how he arrived the value at Rs.12,160-80 for the loss of energy sustained on account of pilferage and there was a specific finding that the petitioner consumer has committed pilferage of energy as per the reasons mentioned in para 6 of his order. The figure arrived by the final assessing

authority is not based on acceptable formula by the Member, a show clause notice dt. 29-6-1992 was issued by the second respondent specifying the figures arrived at by him for the energy pilfered, which was not taken into consideration by the final assessing authority. After considering the explanation submitted by the petitioner, the second respondent passed final order in exercise of suo motu powers estimating the value of energy pilfered at Rs.4,54,349-00. In view of the same, the formula for calculating the final assessment is in tune with condition 39.7.4.3 which is a guiding factor for assessing the energy pilfered either provisionally or finally. In view of the same, no infirmity is discernible to the impugned order passed by the second respondent.

The writ petition is accordingly dismissed. No costs.

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A.GOPAL REDDY,J

Dt. 21-2-2006

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